No. 78-668

In the Supreme Court of the United States

OCTOBER TERM, 1978

GEORGE RAYMOND DIPP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
FRANK J. MARINE
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 581 F. 2d 1323.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1978. A petition for rehearing was denied on September 19, 1978. The petition for a writ of certiorari was filed on October 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether prosecutorial misconduct in petitioner's conspiracy trial barred the government from indicting him subsequently for perjury.

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted

of making a false declaration under oath, in violation of 18 U.S.C. 1623. Petitioner was sentenced to three years' imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. A).

The relevant facts are summarized in the opinion of the court of appeals (Pet. App. 2a-3a). Petitioner was originally tried in the district court for participation in a conspiracy to import marijuana into the United States. At that trial, a government informant, Paul Finefrock, testified that petitioner had discussed a marijuana smuggling venture with him that involved the use of airplanes. Petitioner testified that he never had any such conversation with Finefrock. He was subsequently acquitted on all charges.

Thereafter, the United States Attorney's office in Nevada learned that the Drug Enforcement Administration office in El Paso, Texas possessed a tape recording of Finefrock's conversations with petitioner. Based in part on this tape recording, petitioner was indicted for falsely denying under oath that he had participated in such conversations.

Petitioner moved to dismiss the perjury indictment on the ground that the government violated his rights when it failed to disclose the existence of the tape recording prior to his conspiracy trial. During a hearing on this motion, the affidavit of DEA agent Cameron, the case agent assigned to petitioner's conspiracy trial, was admitted into evidence (Tr. 3-4; R. 82-84).[1] Agent Cameron's affidavit acknowledged that Finefrock had stated at the time of the conspiracy trial that a tape recording had been made of his conversation with petitioner. However, Cameron had also been informed by the DEA office in El Paso that no

[1]"Tr." refers to the transcript of the April 8, 1977 hearing on petitioner's dismissal motion. "R" refers to the clerk's transcript in the court of appeals.

such tape recording existed, and he relied upon that information. Cameron learned for the first time that the tape recording did in fact exist after the conclusion of petitioner's conspiracy trial (R. 83).

The district court denied petitioner's motion to dismiss, finding that (R. 103):

> There was no prosecutorial misconduct for failure to discover and reveal to defense counsel the evidence on which the government now relies to prove [petitioner's] perjury. This evidence was unknown to the prosecuting attorney and the DEA investigating agent at the time of the [drug conspiracy] trial.

The court of appeals upheld this finding, noting that "[t]here is no evidence that the prosecutor knew of the tape's existence and intentionally withheld it in order to induce [petitioner] to commit perjury" (Pet. App. 8a).

ARGUMENT

1. Petitioner contends (Pet. 13-14) that the government violated its obligations under the Jencks Act, 18 U.S.C. 3500, and Rule 15, Fed. R. Crim. P., by failing to produce the tape recording of his conversation with Finefrock prior to the original conspiracy trial. Petitioner further asserts that this misconduct bars the government from prosecuting him for perjury occurring in the conspiracy trial.

Petitioner's contention is without merit. As the concurrent findings of both courts below establish (R. 103; Pet. App. 3a, 8a), the prosecution did not know of the existence of the tape recording at the conspiracy trial and did not conceal it.[2] Further review of that factual

[2]As noted by the district court (R. 103), the prosecution surely would have introduced the tape recording at the conspiracy trial if it had known of its existence. The recording would have constituted convincing evidence of petitioner's *mens rea* and involvement in illegal drug importation and also would have corroborated Finefrock's testimony.

determination is not warranted. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967).

To the extent that petitioner is contending that the government's unintentional failure to produce the tape recording constituted a violation of the Jencks Act and Rule 16, it is clear that such a violation is not a ground for dismissal of criminal charges unless there is a clear demonstration of prejudice. See, *e.g.*, *United States* v. *Miranda*, 526 F. 2d 1319, 1324-1329 (2d Cir. 1975), cert. denied, 429 U.S. 821 (Jencks Act); *Karp* v. *United States*, 277 F. 2d 843, 849-850 (8th Cir. 1960), cert. denied, 364 U.S. 842 (same); *United States* v. *Kidding*, 560 F. 2d 1303, 1313 (7th Cir. 1977) (Rule 16, Fed. R. Crim. P.); *United States* v. *Arcentales*, 532 F. 2d 1046, 1049-1050 (5th Cir. 1976) (same); *Hansen* v. *United States*, 393 F. 2d 763, 769-770 (8th Cir.), cert. denied, 393 U.S. 833 (1968). See also *United States* v. *Augenblick*, 393 U.S. 348, 353-356 (1969). In any event, the only "failure to disclose" that is involved in this case occurred in the original conspiracy trial. That trial, of course, ended in an acquittal, and petitioner suffered no prejudice in that proceeding (see Pet. App. 7a).

Petitioner's contention (Pet. 13) that he was misled because his attorney, unaware of the existence of the tape recording, did not "prevent [him] from offering perjured testimony" is also meritless. The government's failure to disclose tape recorded conversations or other inculpatory evidence related to a defendant's testimony does not bar a subsequent prosecution for perjury arising from that testimony. See, *e.g.*, *United States* v. *Del Toro*, 513 F. 2d 656, 664 (2d Cir. 1975); *United States* v. *Camporeale*, 515 F. 2d 184, 189 (2d Cir. 1975); *United States* v. *Dowdy*, 479 F. 2d 213, 230 (4th Cir.), cert. denied, 414 U.S. 823 (1973); *United States* v. *Winter*, 348 F. 2d 204, 210 (2d Cir. 1965). The oath that petitioner took was sufficient warning that he was required to tell the truth (*Del Toro*, *supra*, 513 F. 2d at 664; *Winter*, *supra*, 348 F. 2d at 210), and he had no reason to infer that he was free to perjure himself simply because no tape recording was available to contradict him. This Court has held repeatedly that perjury is never a "permissible way" to respond, even if the defendant believes the government's conduct to be impermissible or unfair. See, *e.g.*, *United States* v. *Wong*, 431 U.S. 174, 180 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 577 (1976); *Bryson* v. *United States*, 396 U.S. 64, 72 (1969).

2. Petitioner also contends (Pet. 6, 8, 10) that Finefrock perjured himself while testifying at the conspiracy trial and that the government had knowledge of this perjury.[3] On this theory, petitioner claims that he is entitled to a dismissal of the perjury charges subsequently filed against him. This contention is frivolous.

The purportedly false testimony of Finefrock was that he was only an "informant," and not a "government agent."[4] Finefrock's testimony only raises a difference of opinion as to the proper characterization of his status, not a deliberate misstatement of a material fact under 18 U.S.C. 1623. Neither court below characterized it as illegal perjury.

In any event, even assuming that the government knowingly presented perjured testimony from Finefrock, petitioner's argument fails because any prejudice that may have resulted from the perjury was completely eliminated by his acquittal in the conspiracy trial. Because Finefrock's purportedly false testimony could not con-

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[3]In this respect, petitioner has completely changed his position from that in the court of appeals. In his appellate brief, he expressly stated that he "does not now contend that the prosecutor knew the testimony of Finefrock was perjurious" (Brief at 22, 6).

[4]Finefrock was of the belief that he could only be characterized as an "informant," and not a "government agent," because he himself was under indictment. See the June 16, 1976, transcript of the conspiracy trial at 185-186.

ceivably have affected the result of petitioner's subsequent prosecution under 18 U.S.C. 1623, there is no ground to reverse his conviction. See, *e.g., United States* v. *Agurs,* 427 U.S. 97, 103 (1976); *United States* v. *Anderson,* 509 F. 2d 312, 327 n.105 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975).

3. Finally, petitioner contends (Pet. 10, 15-16) that the perjury indictment was a vindictive response to his acquittal in the conspiracy trial. This contention was not made in the court below and should not be considered in this Court for the first time. *United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977).

In any event, it is well established that the government may prosecute a defendant for perjury even though he is acquitted of all charges in a prior trial. See *United States* v. *Williams,* 341 U.S. 58, 63-65 (1951). The present prosecution could not have been brought until after petitioner's first trial because the crime had not been committed until he testified, and the inculpatory evidence was not found by the government until after trial. This is clearly not a case where the government prosecuted a defendant to penalize the exercise of a constitutional right. See *Blackledge* v. *Perry,* 417 U.S. 21, 29 n.7 (1974); *United States* v. *Sturgill,* 563 F. 2d 307, 309 (6th Cir. 1977). Petitioner was prosecuted not because he prevailed in the prior trial, but rather because he perjured himself in his attempt to prevail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILLIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
FRANK J. MARINE.
Attorneys

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